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DECISION

THE HUMAN RIGHTS CODE, 1981, S.O. 1981, c. 53, proclaimed in force June 15, 1982.

IN THE MATTER OF:

The Complaint made by Rosemary Mark of South Porcupine, Ontario, alleging discrimination with respect to employment because of her marital status by Porcupine General Hospital, its servants and agents, and Art Moyle, contrary to subsection 4(1) and section 8 of the Human Rights Code, 1981, S.O. 1981, c. 53.

APPEARANCES:

Ms. Janet Minor, Counsel for the Ontario Human Rights Commission.

Mr. Rino Bragagnolo, Counsel for the Respondents.

A HEARING BEFORE:

Peter A. Cumming, Q.C., a Board of Inquiry in the above matter, appointed by the Minister of Labour, the Honourable Russell H. Ramsay, October 3, 1984, with the hearing held November 1, 1984, in Timmins, Ontario.

INTRODUCTION.

This Board of Inquiry was appointed by the Honourable Russell H. Ramsay, Minister of Labour, October 3, 1984 (Exhibit #1). Counsel for all parties are to be commended for their cooperation in presenting the evidence, which resulted in the Board being concluded in one day. There is not any real dispute in respect of the evidence. In essence, the issues turn upon the Complainant, Rosemary Mark, being dismissed from her employment with the corporate Respondent, Porcupine General Hospital, by the individual Respondent, Mr. Art Moyle, the senior Administrator of the hospital, because she was married to another employee, Mr. Norman Mark, who worked in the same department as his spouse. Thus, Mrs. Mark alleges in her Complaint (Exhibit #2) a breach of subsection 4(1) and section 8 of the Human Rights Code, S.O. 1981, c. 53 (hereafter the "Code") which read:

> 4.(1) Every person has a right to equal treatment with respect to employment without discrimination because of...marital status...
>
> 8. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

The Respondents deny that there was a breach of sections 4(1) and 8, and defend on the further basis that even if there is prima facie discrimination, then they have an absolute defence by reason of the exemption in either paragraph 23(b) or in paragraph 23(d) of the Code, which read:

23. The right under section 4 to equal treatment with respect to employment is not infringed where,

(b) the discrimination in employment is for reasons of...marital status if the...marital status of the applicant is a reasonable and bona fide qualification because of the nature of the employment; [or]

...

(d) an employmer grants or withholds employment or advancement in employment to a person who is the spouse, child or parent of the employer or an employee.

THE EVIDENCE.

The Complainant, Mrs. Rosemary Mark, commenced working as a "spare housekeeper" with Porcupine General Hospital on October 17, 1983. Mr. Rolly Philion, the "maintenance supervisor" at the hospital, hired her, having determined from her husband that she was interested in the position. Mr. Mark acts as a maintenance person at the hospital, under Mr. Philion's supervision. Mr. Philion's housekeeping and maintenance department comprises some five permanent positions for housekeepers, plus two or three "spares", who all seem to have been females to date, plus the two (Mr. Philion and Mr. Mark) maintenance personnel.

Mr. Philion has occupied the position of supervisor since about the end of August, 1983, after the death of the previous supervisor, and was formally appointed to the position only as of September 19, 1983. Thus, he was very new to his position, when he hired Mrs. Mark.

Mrs. Mark completed an application (in the nature of the standard form, filed as Exhibit #3) the day she commenced work. She was hired on a basis of doing at least 26 1/2 hours over Thursdays to Sundays and receiving work on "call" over Mondays to Wednesdays, receiving a salary of some $8.23 per hour ($7.22/hr plus 14% in lieu of certain benefits). She worked about 110 hours (Exhibit #4) on this basis, until she was told by Mr. Philion that apparently there was a hospital policy whereby spouses could not work together in the same department, and accordingly her employment would be terminated, which it was as of November 6, 1983.

Apparently what happened was that the individual Respondent, W. Arthur Moyle, Administrator of the hospital since 1962, at some point before November 4, 1983, saw Mrs. Mark, whom he knew by sight, working in the same department as Mr. Mark, and on learning that she had been hired as a "spare housekeeper", advised Mr. Philion that her employment should be terminated, because the hospital, as a matter of general policy, did not want a husband and wife working in the same department.

The hospital is relatively small, with some 65 beds, and Mr. Moyle would ordinarily do most of the hiring. However, apparently because Mr. Moyle was going to be away, it is quite clear that Mr. Philion was given the express authority by Mr. Moyle to hire a housekeeper in the instant situation. In giving this authority to Mr. Philion, it simply did not occur to Mr. Moyle that Mr. Philion might hire the spouse of an existing employee in Mr. Philion's department. As such, Mr. Philion had

the general and unqualified authority to hire a spare housekeeper, and exercised that authority by hiring Mrs. Mark.

It is also clear that there was no express policy, oral or written, at the time that a husband and wife could not work in the same department, because the issue had not arisen before. The reason there was not an express policy is because Mr. Moyle was the single individual who did virtually all of the hirings. He testified that under the constitutional authority of the hospital he is given the authority to hire and fire. He does on occasion delegate this authority to department heads as happened in the instant situation. However, after becoming aware of the Mark situation, a memo (Exhibit #7) was distributed to department heads advising them that no staff were to be hired in the future, without Mr. Moyle's prior approval. Whether there was or was not a policy is irrelevant. It is clear that Mr. Moyle honestly believed that it would be best not to have a husband and wife working together in the same department. If Mr. Moyle had been doing the hiring of a housekeeper on October 17 it is quite clear he would not have hired Mrs. Mark, because that was his "policy".

Mr. Moyle's reason for this policy was that he thought it was not in the best interest of the department to have a husband and wife working together. He felt there would be "resentment" by fellow housekeepers if Mrs. Mark was promoted. However, it seems that when housekeepers do get promotions (that is, move from the "spare" to "permanent" category) this is really done on a seniority basis.

In the "maintenance" department, when Mr. Philion was absent, Mr. Mark would act as supervisor in his place, and Mr. Moyle testified this would be about ten percent of the time. Mr. Moyle implied that there might be favourtism shown, or at least a perception on the part of some in the department of favourtism being shown by Mr. Mark toward his wife, when he was acting supervisor. However, as acting supervisor, Mr. Mark would not have the power to promote a housekeeper. Mr. Moyle said that if Mr. Philion left the employment of the hospital, Mr. Mark could quite possibly be given his position as the permanent supervisor. Put simply, Mr. Moyle saw a husband and wife working-together situation to be "an unneeded, unnecessary complication" and he did not want it in the interest of his idea of good administration of the hospital. There are instances in the hospital where both husband and wife are employees, but this has always been where each spouse is in a separate department. For example, Mr. Philion's spouse is a registered nurse, but she works in a separate department from his. There has been a situation in the past when a mother and daughter were both nurses in the same department.

Mr. Moyle had no objection to Mrs. Mark's work performance as a housekeeper, and it is clear her employment was terminated simply because of her being married to Mr. Mark. It is clear Mr. Moyle bears no animosity at all towards Mrs. Mark. However, while he did not intend to be in breach of the Code, quite clearly, in a factual sense, he intentionally terminated Mrs. Mark's employment because she was married to another employee in the same department.

Mr. Moyle testified that there were 10 or 12 applications for housekeeping positions on file at the time Mrs. Mark was fired, including that of the woman who replaced her. It seems Mrs. Mark would not have got the job, but for the fact that Mr. Philion knew that, through her husband, she was interested. When Mr. Moyle later learned of the hiring, he testified that Mr. Philion told him he thought that hiring Mrs. Mark was the quickest way of filling the position. Mr. Philion hired her on her merits but in doing so, Mr. Moyle felt Mr. Philion made a mistake in judgment, because of her marital status.

THE LAW.

A prima facie breach of sections 4(1) and 8 was established by the evidence. Mrs. Mark, as an employee of the hospital, has the "right to equal treatment with respect to employment without discrimination because of...marital status". This hearing is the first in respect of "marital status" under the new Code, but there are cases under the predecessor Ontario Human Rights Code, c. 340, R.S.O. 1980 (hereinafter the "old Code"), and similar human rights legislation in other Canadian jurisdictions.

Alberta was the first jurisdiction in Canada to add "marital status" as a prohibited ground in respect of employment in 1971 (S.A. 1971, c. 48) and by 1979 all Canadian jurisdictions had followed suit, Saskatchewan being the last (S.S. 1979, c. S.24.1). "Marital status" is defined in paragraph 9(a) of the new Code,

9. In Part I and in this Part,

(g) "marital status" means the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage.

It is noted also that "family status" is defined in paragraph 9(d) as meaning "the status of being in a parent and child relationship".

The early decisions of boards of inquiry in this area wrestled with the question as to when "marital status" was the ground of discrimination. It is necessary to review briefly these decisions before considering the new Code. In Warren v. F.A. Cleland & Son and Fowler (B.C., 1975; referred to in Tarnopolsky, Discrimination And The Law, 1982 Richard De Boo Limited, Toronto, at p. 297) a complainant was denied rental accommodation because she was a single female parent. In Segrave v. Zeller's Limited (Ont., 1975; Tarnopolsky, ibid), a male was denied employment because he was recently divorced. The Boards in each case held there was discrimination because of "marital status".

In Blatt v. Catholic Children's Aid Society of Metropolitan Toronto (Ont. 1980, Chairman Bruce Dunlop, affirmed by the Ontario Divisional Court, July 1981, unreported; see Tarnopolsky, supra, at pp. 298-299) a man hired as a child care worker in a boys' residence was discharged because he was living with his fiancee in a "common-law" relationship. Chairman Dunlop held that

the Complainant should be dismissed on the reasoning that the termination was based on "life style" or "sexual morality" rather than "marital status". A board in the 1980 Saskatchewan case of Strickland and Fraser v. Dial Agencies had come to the opposite conclusion in respect of a common-law relationship (see Tarnopolsky, supra, p. 299). In Bailey, Carson, Pellerin, and McCaffrey and the Canadian Human Rights Commission v. Minister of National Revenue (Oct. 14, 1980), I held that a "common-law" relationship could raise questions of discrimination on the ground of "marital status" (see Tarnopolsky, supra, pp. 300-302). Chairman Jones was of the same opinion in another decision of a Canadian Human Rights Tribunal in Bain v. Air Canada (April 15, 1981). It would seem the result in Blatt would undoubtedly now be different, given the present, expansive, definition of "marital status" in paragraph 9(g) of the new Code.

In Cindy Bossi v. Township of Michipicoten and K.P. Zurby, (1983) 4 C.H.R. R. D/1252 (Ontario: Chairman Martin Friedland), the female complainant was refused employment as a clerk in a Township office because her husband was then employed with the Township police force.

Chairman Friedland seemed to find that the prohibition against discrimination on the basis of "marital status" under section 4 of the Ontario Human Rights Code, R.S.O. 1980 is confined to the situation where the refusal to employ is simply because the complainant is married, but does not cover discrimination because she is married to a particular person (a

police officer in that case). He was of the view also, obiter, that the definition of "marital status" given by paragraph 9(g) of the new Code expressly limits that ground to the first, more narrow interpretation (Bossi, supra, at D/1254, para. 10914). With great respect, I cannot agree.

It seems to me the fact the discrimination arises because of the "marital status" of a complainant with respect to a particular person, rather than simply because of the marital status of the complainant, should not matter. If hypothetically, an employer refuses a black person employment because the employer holds racially discriminatory views toward the particular individual, but allows some other persons who are black to work for him, there would be a breach of either the old or the new Code. Similarly, if an employer discriminates against a person on the basis of her being married to a particular person, even though he does not discriminate against married persons generally, the particular aggrieved person would, in my opinion, be unlawfully discriminated against. The "marital status" (that is, the status of 'being married') of the complainant is an essential element, or proximate operative cause, of the refusal of employment. If the complainant in Bossi had not been married to, but simply known the police officer as a casual acquaintance in that case, she would not have been rejected because of her "marital status". If the Board's reasoning in Bossi was that, in essence, the complainant was rejected because of a perceived conflict of interest, the fact remains the perceived conflict of interest only arose because of her "marital status". In my opinion, Bossi was wrongly decided on

this point. (However, the Board in that case also decided on the facts that a bona fide occupational qualification defence arose under subsection 4(6) of the old Code, and on this finding alone the complainant in Bossi lost in all events.)

There is support for my interpretation in another recent decision. In Mabel Monk v. C.D.E. Holdings Ltd., Dakota I.G.A., and Dennis Hillman, (1983) 4 C.H.R.R. D/1381 (Manitoba: Chairman Paul S. Teskey) the female complainant's employment was terminated because she was married to a particular person, someone who was a shareholder of her corporate employer and was engaged in a legal dispute with such employer. After a careful review of the authorities, the Board concluded that the definition of "family status" in section 1(1) of the Manitoba Human Rights Act, C.C.S.M. c. H175, includes discrimination because a specific person is the individual's spouse or child (at D/1384, paras. 11900, 11904). American cases have also adopted the broader interpretation of "marital status". See Kraft, Inc. v. State of Minnesota (1979) 284 N.W. 2d 386 (S.C. Minn.); Thompson v. Board of Trustees School Dist. (1981) 627 P.2d 1229 (Sup. Ct. Montana); cf. Yuhas v. Libby-Owens-Ford Co. (1977) 562 Fed. Rep. 2d 496 (U.S.C.A.; 7th Cir.) (all cited in Bossi, at D/1254, para 10915).

I would base my above interpretation of the meaning of "marital status" as a prohibited ground on ordinary rules of general statutory interpretation. However, I could add that it is a general rule in interpreting human rights legislation, as it is remedial in purpose, to do so in a liberal manner so as to

effectuate its purpose. See Brian B. Hope v. Royal Insurance Company of Canada and Michael G. Bates v. Zurich Insurance Company (Ontario: Interim decision of Professor Frederick H. Zemans of June 21, 1984, not yet reported), where in interpreting a "family status" issue, Chairman Zemans states:

> Following the above-mentioned approach of looking to the general scope and purview of legislation, it is beyond doubt that the Human Rights Code, 1981, is both protective of the public (rather than strickly punitive) and remedial in nature. The provision of equal rights and opportunities and the "creation of a climate of understanding and mutual respect" are the predominant goals of the Code as expressed in its preamble. Retribution is conspicuously absent from this delineation of goals, and a reading of the functions of the Commission (as enumerated in s. 28) impresses the reader with the conciliatory, proactive nature of this legislation. Furthermore, the flexible powers of boards of inquiry to make a variety of orders aimed at restitution and future compliance with the Code (s. 40) -- in furtherance of the goal to create "a climate of understanding and mutual respect" -- overshadows the brief mention of liability to a "fine" for contravention of the Code in s. 43(1).
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> That the Code is intended to be remedial is apparent from the following clause of its preamble:
>
> > And Whereas these principles have been confirmed in Ontario by a number of enactments of the Legislature and it is desirable to revise and extend the protection of human rights in Ontario...Her Majesty...enacts as follows...(emphasis added).
> > (at pp. 17-18).

The Interpretation Act, R.S.O. 1980 c. 219, provides:

> 10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of anything that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

This provision has been cited in many board of inquiry decisions under the old Code, in giving a broad interpretation to human rights legislation. See, for example, Mrs. Theresa O'Malley (Vincent) v. Simpsons-Sears Ltd. (1981) 2 C.H.R.R. D/267; (1982) 36 O.R. (2d) 59 (Div. Ct.), 38 O.R. (2d) 423 (O.C.A.), appeal pending to the Supreme Court of Canada; (Ontario: Edward J. Ratushny) at D/268, paras. 2321 to 2322. Chairman Ratushny put the point nicely, in stating "the ... Code ... is not a penal or taxation statute but a "special type of 'social purpose' Statute" for which the principle of restrictive interpretation is inappropriate (at D/268, para. 2321).

A prima facie case of discrimination having been established on the evidence, the asserted defences through the paragraph 23(b) and 23(d) exemptions must now be considered.

Was the "marital status" of the applicant "a reasonable and bona fide qualification because of the nature of the employment", within the meaning of paragraph 23(b) of the Code?

There is, of course, considerable jurisprudence on the "bona fide occupational qualification" (hereafter "b.f.o.q.") exemption under subsection 4(6) of the old Code. See, for example, the discussion in Paul S. Carson et al v. Air Canada (1984) 5 C.H.R.R. D/1857 (Review Tribunal decision under the Canadian Human Rights Act), at D/1867 to D/1874, paras. 16017 to 16081.

Bossi represents a good example of the b.f.o.q. defence, or what is now the paragraph 23(b) exemption, being operative where there may otherwise be discrimination on the ground of "marital status". In Bossi, the complainant was seeking the position of "accounts clerk", but if she obtained this position she would be processing her police officer husband's expense claims. Moreover, her husband had an active role in salary negotiations for the Police Association, and the accounts clerk had access to Police Commission documents pertaining to salary negotiations. The respondent Township argued that there was a substantial potential conflict of interest such that the complainant should not be hired, and Chairman Friedland accepted this position as constituting a b.f.o.q. defence.

However, in the instant situation I do not think the paragraph 23(b) exemption has been established on the evidence. Even though Mr. and Mrs. Mark would come into contact often while working, and even though Mr. Mark would occasionally supervise Mrs. Mark, I think that given the jobs they were performing, it was not, on an objective test basis, a "reasonable and bona fide

qualification" to stipulate that a husband and his wife could not work together as members of a maintenance and housekeeping department in a hospital. There was no definite and certain concern, such as the potential conflict of interest in Bossi, to exempt the discrimination, once the husband and wife were employees in the same department. Perhaps this point is seen more clearly if one imagines hypothetically that a male maintenance worker had met a female housekeeper on the job in the hospital, they had fallen in love and then been married. There would seem to be no justification for terminating the employment of one of the spouses in that situation, and I do not think Mr. Moyle would have done so. Incidentally, Mr. Moyle related that two unmarried people working in one of the other departments of the hospital in the past had become married, but neither's employment was terminated by the hospital for the reason of the changed "marital status". Mr. Moyle's real concern is that as a matter of general good administrative practice it is not a good idea to have spouses working together in the same department, he personally would not have hired Mrs. Mark given this view, and when he realized she had been hired he tried to rectify the situation as quickly as he possibly could. I do not question the subjective good faith on the part of Mr. Moyle in making this decision: however, the objective component inherent to the paragraph 23(b) exemption has not been met. The reasoning of McIntyre, J., speaking for a unanimous Supreme Court of Canada in Ontario Human Rights Commission et al v. Borough of Etobicoke (1982), 132 D.L.R. (3d) 14, at 19-20 in respect of the b.f.o.q. defence under the old Code, is apt in interpreting the paragraph 23(b) exemption of the new Code.

> To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

The exemption afforded by paragraph 23(d) clearly enunciates a public policy of non-interference in respect of nepotism by some employers in hiring, and non-interference in respect of the opposite position of some other employers in arbitrarily excluding one spouse from consideration for employment when the other spouse is an existing employee. Preference for a spouse, or arbitrary exclusion of consideration of a spouse, for exmployment or advancement, is left to the unfettered discretion of the employer.

However, the exemption in paragraph 23(d) is limited to granting or withholding employment in the first instance, or granting or withholding advancement once employed. For example, this would allow the hospital not to promote Mr. Mark as a supervisor because he is the spouse of a fellow employee. Chairman Friedland points out in Bossi that the Government of Ontario itself has a policy of arbitrary exclusion in this regard.

> The Ontario Government itself in its Manual of Administration (dated April 6, 1981) for example, specifies that "spouses shall not occupy positions in the same immediate area; under the same supervisor; or where one spouse supervises the other". (At D/1254, para. 10918)

The problem from the hospital's standpoint in the instant situation is that Mr. Mark became an employee of the hospital, and thus paragraph 23(d) does not apply. But for the innocent error of Mr. Philion, in not hiring on the basis of Mr. Moyle's preferences (unknown to Mr. Philion at the time), Mrs. Mark would never have been hired, and the hospital would enjoy a complete exemption from discrimination by reason of paragraph 23(d). It was simply the accident of Mr. Moyle's absence, and his delegation to Mr. Philion of the authority to hire a housekeeper, that resulted in Mrs. Mark becoming an employee. One might describe this as an innocent slip-up in the administration of the hospital. However, it must be emphasized, Mrs. Mark was herself entirely an innocent party. Once she became an employee, she is entitled to the full protection of the Code. The Respondents cannot excuse themselves from a transgression of the Code on the basis that they inadvertently or haplessly got themselves into a position from which they could only extricate themselves by a breach of the Code. A breach of the Code is a breach of the Code. However, the circumstances of the breach of the Code are appropriate in considering remedies. Thus, the Respondents unlawfully discriminated against the Complainant and she is entitled to the appropriate remedies.

Section 40 of the Code provides for remedies, and I have reviewed this provision in Cindy Cameron v. Nel-Gor Castle Nursing

Home and Marlene Nelson, (1984) 5 C.H.R.R. D/2170 at D/2196 - D/2201. In the instant situation there was not an infringement of the Code "engaged in wilfully or recklessly", within the meaning of paragraph 40(1)(b).

In Cameron, at D/2198, paragraph 18539, I stated:

> An inherent, but separate, component of the general damage award should reflect the loss of the human right of equality of opportunity in employment. This is based upon the recognition that, independent of the actual monetary or personal losses suffered by the complainant whose human rights are infringed, the very human right which has been contravened itself has intrinsic value. The loss of this right is itself an independent injury which a complainant suffers.

In the instant situation, I think that an award of $200.00 general damage on the above basis, is appropriate. Given all the circumstances, there was not a real substantive loss of dignity or self-respect, or loss in the sense of injured feelings, emotional upset, psychological damage or mental anguish, such that general damages should be awarded on this basis. There was, however, loss of the right to freedom from discrimination on the prohibited ground of "marital status".

Given the reason for the dismissal in the instant situation, I think that an award of damages for lost wages should approximate quantitatively an award that might be given by a court if this were a wrongful dismissal case. In other circumstances, this approach may well not be appropriate: Cameron, D/2197, para. 18533.

The Complainant was guaranteed a minimum of 26 1/2 hours work per week at $8.23 per hour. Over four weeks, she was thus assured of at least 106 hours work, or $872.38. I have reviewed the law in respect of damages for lost wages in Rosanna Torres v. Royalty Kitchenware Limited and Francesco Guercio (1982) 3 C.H.R.R. D/858, Morley Rand v. Sealy Eastern Limited (1982) 3 C.H.R.R. D/938, and Cameron, supra, D/2196, para. 18525 - D/2198, para. 18536). On the evidence, Mrs. Mark took all reasonable steps to mitigate.

In my opinion, Mrs. Mark should receive as damages for lost wages, the sum of $872.00.

The further award of "interest" in respect of damage awards was made in Cameron, supra (at D/2201, paras. 18564, 18565). The commencement date for interest is the time of service of the complaint upon the respondents. The specific evidence on this point should be given in the general course of the introduction of a Complainant's evidence before any board of inquiry. This date was very uncertain from the evidence in the instant situation, but as the Complaint (Exhibit #2) is dated December 12, 1983, it would seem inferentially to have been served by at least the end of February, 1984. The applicable interest rate is that established by the Bank of Canada for the month previous to the month in which service of a complaint is effected. This evidence also was not given, but judicial notice can be taken of the fact that the Bank of Canada interest rate was certainly always above ten percent over the past year. Accordingly, an interest rate of

ten percent per annum is appropriate in the instant situation. Thus, interest should run from March 1, 1984 to the date of this award, being 264 days. On $1,072.00 ($200.00 general damages and $872.00 lost wages) this amounts to about $72.00.

The practical solution in the instant situation would have been for the hospital to offer Mrs. Mark a position in another department, if and when a suitable one became available. The evidence is uncertain as to whether another suitable position has been open at any time since her employment was terminated, and it is unknown as to who, Mrs. Mark or the Hospital, failed to take any initiative in this regard. Perhaps there were negotiations in contemplated settlement of the complaint: it would be improper, of course, for this Board to hear of any such negotiations which must be on a without prejudice basis. I only raise the above to indicate the most appropriate remedy in the instant situation, and the one clearly suitable in a situation where, in a layperson's sense of the word, both parties might well be considered to be 'innocent'. As I emphasized in Cameron (supra, at D/2196, para. 18523) the primary remedy in an "employment" case where a complainant has been denied her rights to equality of treatment, is an order under paragraph 40(1)(a) directing that an offer of employment be made. The remedy provisions should be construed liberally to achieve the purposes and policies of the legislation: Rand, supra, at D/956. An overriding objective of the remedies is to achieve restitution:

> that is, the eradication of the harmful effects of a respondent's actions on the complainant, and the

> placing of a complainant in the same position in which she would have been, had her human rights not been infringed by the respondent.
> (Cameron, supra, at D/2196, para. 18523)

The practical solution is for Mrs. Mark to be given the opportunity of employment in another department. However, given first, tht she is no longer an employee of the hospital, and second, that the freedom in hiring extended to an employer by paragraph 23(d) allows the employer to not hire her in a department where her husband is also employed, I do not think an order should direct that she necessarily be offered an employment position in the maintenance and housekeeping department.

ORDER

This Board of Inquiry having found the Respondents, the Porcupine Geneal Hospital and Mr. Art Moyle, to be in breach of subsection 4(1) and section 8 of the Ontario Human Rights Code, 1981, S.O. 1981, c. 53, in respect of the Complainant, Rosemary Mark, for the reasons given, this Board of Inquiry orders the following:

1. The Respondents are jointly and severally liable to pay forthwith to the Complainant, Rosemary Mark, as follows:

   (a) as damages for lost wages, the sum of eight hundred and seventy-two ($872.00) dollars;

   (b) as general damages, the sum of two hundred ($200.00) dollars, and

   (c) as interest in respect of such awards of damages in (a) and (b), the sum of seventy-two ($72.00) dollars.

2. The Respondent, Porcupine General Hospital, shall give notice in writing to the Complainant, Rosemary Mark, personally, as to any and all positions of employment

(other than positions to which nurses or doctors would be hired) at the Hospital as they become available due to vacancies, until the end of 1986 or the employment by the said Respondent of the Complainant, whichever comes first, and shall consider any application for employment submitted by the said Complainant on its merits and in compliance with the Code.

Dated at Toronto this 19th day of November, 1984.

Peter A. Cumming, Q.C.
Board of Inquiry.